# MEDICAL MALPRACTICE

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The subject is that of an ancient and great profession, medicine. This subject has, however, been a bone of contention between both lawyer and doctor, so actually both professions are involved. The question is whether their relationship will be such that they must contest with each other, or whether they may by investigation and research, try each in its own way to solve their mutual problems. May not each enter into that ancient fellowship for something more than private gain and thus become an instrument to advance the cause of Justice?

That the inquiry be worthwhile we will start at the beginning and first consider the relation of physician and patient.

## THE RELATION OF PHYSICIAN AND PATIENT

The practice of medicine is in its broadest sense, the practice of the art of healing diseases and preserving health. Thus, when a licensed practitioner undertakes to treat a patient, and in so doing does it badly, a right of action for malpractice arises. The legal relation of the physician and patient is founded upon the theory that the former is learned, skilled and experienced in subjects about which the latter knows little or nothing. These subjects are however of the most vital importance and interest to the patient, as upon them may depend the health, or even life, of himself or his family. Of necessity, the patient must place great reliance, faith and confidence in the professional word, advice and acts of his attending physician.

Because of this relationship between physician and patient, it is essential to a complete understanding of the law of physicians and surgeons as it relates to the liability of medical practitioners for malpractice, that preliminary consideration be given to certain general fundamental principles having to do with the elements of the relation. These elements include: the creation and nature of the relation, its continuance and termination, and the particular duty of good faith and fair dealing of the physician with his patient. It must first be noted that a physician is under no duty to engage in practice or to accept professional employment. However, once

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[1] Travelers Ins. Co. of Hartford v. Bergeron, 25 F.2d 680 (8th cir. 1928); 41 Am. Jur. *Physicians and Surgeons* §§ 70, 71 (1939).

he accepts a patient for the purpose of medical or surgical treatment, the legal relation of physician and patient is created.[1] Physicians and surgeons of a hospital, public or private, enter into this legal relation upon the admittance of any patient.

The existence of the relation is a matter of fact, depending upon whether the patient entrusted himself to the care of the physician and whether the physician accepted the case. Once having undertaken the care of a patient, the law imposes upon the physician the obligation of exercising due care and the amount of skill common to his profession and commensurate with his position.[2] The standard of skill and care will be considered in more detail later.

Because a physician occupies a position of trust and confidence as regards his patient, it is his duty to act with the utmost good faith. If he knows that the treatment adopted by him will probably be of little or no benefit, and there is an available treatment which is more likely to be successful and which he does not have the training or facilities to give, he must advise his patient of these facts. His failure to do so and the continuance of his former unsuccessful treatment constitute a breach of his professional duty to his patient.[3]

A physician is also under a professional obligation in making a disclosure to his patient concerning the latter's condition, to make known the results of the treatment administered, the possibility of cure, etc. He must speak and relate fairly and truthfully at the peril of being held liable in actions for damages for fraud and deceit.[4]

It is the welfare of the citizens of a state, and therefore of the state itself, that demands that those persons practicing medicine and surgery shall be duly able and careful.[5] It is public policy to protect the health and lives of the people, particularly the weak or credulous, the ignorant or unwary, from careless, unskillful, or negligent medical practitioners. This is partially accomplished by making such practitioners answerable in damages to their patients for failure to employ the required care, skill, or knowledge in the performance of their professional duties and undertakings.[6]

Universally, it is the duty of an attending physician or surgeon

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2 Tveldt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940).

3 *Ibid.*

4 23 Am. Jur. *Fraud and Deceit* § 75 (1939).

5 Stevenson v. Yates, 183 Ky. 196, 208 S.W. 820 (1919).

6 Hansen v. Pock, 57 Mont. 51; 187 P. 282 (1920); Thaggard v. Vafes, 218 Ala. 609, 119 So. 647 (1929); Dunn v. Beck, 80 Mont. 414, 260 Pac. 1047 (1927); Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228 (1888); 41 Am. Jur. *Physicians and Surgeons* § 78 (1939).

to use reasonable care and skill for the safety and well being of his patients. In the absence of any statute, the common law holds every physician or surgeon answerable for injury to his patient resulting from want of the requisite knowledge and skill, the failure to use reasonable care and diligence, or the failure to exercise his best judgment under the attending circumstances. The duty of a physician or surgeon to bring skill and care to the amelioration of the condition of his patient does not rise from contract, but has its foundation in public considerations which are inseparable from the nature and exercise of his calling. The relation existing between physician and patient is, as seen above, the result of a consential transaction, and not necessarily one of contract. Thus, such duty is not affected by the fact that the service rendered is gratuitous,[7] or by the fact that the physician was employed by a third person with no contractual relation existing between the physician and the patient.[8]

### General Standards of Skill and Care

A physician is liable to his patients for failure to exercise requisite skill and care. Thus, a physician must possess that reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession. He must exercise reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge. He must exert his best judgment as to the treatment of the case entrusted to him. In short, a physician must use such care, skill and diligence as physicians and surgeons in good standing in the same locality and in the same general line of practice ordinarily have and exercise in like cases.[9] The terms "physician" and "surgeon" are used interchangeably by the courts. There is apparently no attempt, so far as this point is concerned, to distinguish their respective liabilities.[10] The practitioner is equally responsible in either case whenever an injury results from want of skill or care.[11]

A physician is not absolved from liability for failure to exercise proper skill in a particular case by the fact that the result is as good as is usually obtained in like cases. Neither is he absolved by the

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[7] Viita v. Fleming, 132 Minn. 128, 155 N.W. 1077 (1916); Hansen v. Pock, *supra* note 6.

[8] National Sav. Bank of D.C. v. Ward, 100 U.S. 195 (1880); Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910); Viita v. Fleming, *supra* note 7.

[9] Palmer v. Humiston, 87 Ohio St. 401, 101 N.E. 283 (1913); Dabney v. Briggs, 219 Ala. 127, 121 So. 394 (1929); Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333 (1832); Hallam & Barnes v. Means, 82 Ill. 379, 25 Am. Rep. 328 (1876).

[10] Bonnet v. Foote, 47 Colo. 282, 107 P. 252 (1910).

[11] Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72 (1860).

fact that the same result would have ensued if he had not treated the patient.[12] The law does not require of the physician and surgeon that they possess and use the utmost degree of care and skill attainable or known to the profession. The law exacts only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under the same or similar circumstances.[13] The physician and surgeon are not held to the standard of a thoroughly educated or well educated man of their profession. They are not required to exercise at all times their best skill and ability. The law recognizes that no one can always be at his best, and their conduct is subjected to a test by a reasonably extraordinary standard.[14] The standard contemplated is not what is actually the average merit among all known practitioners from the best to the worst and from the most to the least experienced. It is the reasonable average merit among ordinarily good physicians.[15] However, the fact that the best of physicians commit a certain act does not render the like act of a defendant physician one plainly non-negligent and thus take it away from the jury. The required degree of skill and care is not increased by the refusal of the physician to accept assistance in his diagnosis of a case,[16] or by his refusal to call in a consulting physician, provided he uses his best judgment.

### Standards as Determined By Particular Circumstances

Although the standards of skill and care which a physician must exercise in the treatment of a patient are very general in their scope and application, it is obvious that injustice might result from a rigid and undeviating uniform application of these standards to all practitioners without regard to special conditions or particular circumstances. Accordingly, the law takes into account such matters as the difference in the several schools or systems of medicine, the existing state of medical knowledge, the locality and place of practice, and the limitations which attend the practice of a special or limited branch or system of the healing art. All these considerations must be weighed in determining whether in a particular case

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[12] Burk v. Foster, 114 Ky. 20, 69 S.W. 1096 (1902); Granger v. Still, 187 Mo. 197, 85 S.W. 1114 (1905).

[13] Patten v. Wiggan, 51 Me. 594, 81 Am. Dec. 593 (1862); Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898); Atkins v. Clein, 3 Wash. 2d 168, 100 P.2d 201 (1940).

[14] Loudon v. Scott, 58 Mont. 645, 194 Pac. 488 (1920); Dorris v. Warford, 124 Ky. 768, 100 S.W. 312 (1907).

[15] Holtzman v. Hoy, 118 Ill. 534, 8 N.E. 832 (1886).

[16] Potter v. Warner, 91 Pa. 362, 36 Am. Rep. 668 (1879).

the physician has acted with the requisite ability, skill and care in treating his patient.

*School of Medicine*

In law a physician is entitled to have his treatment of his patient tested by the rules and principles of the school to which he belongs. A person professing to follow one system or school of medicine cannot be expected to practice other than in accordance with his school. He is not answerable for bad results so long as he performs the treatment of his patient with skill and care according to the teachings of his school or system.[17] This general rule has been applied to practitioners of the schools of homeopathy, allopathy, psychopathy, chiropractic and Christian Science healing.[18] There is authority, however, to the effect that a limited practitioner, even though unlicensed, must satisfy the test of learning, skill, and care of the average practitioner in the locality rather than that of the average practitioner of his own school where his treatments in the particular case are within the field of general medicine or surgery.[19] The general rule has also been limited by the qualification that the school must be a recognized school of good standing. It must have established rules and principles of practice for the guidance of all of its members as respects diagnoses and remedies which each member is supposed to observe in any given case. Thus, one who treats diseases solely by clairvoyance has been held not to be within the general rule on the ground that clairvoyance having no established rules or principles of practice, cannot be considered as a recognized school of medicine.[20]

*State of Medical Knowledge and Established Modes of Practice*

The law recognizes that medical service is a progressive science. In determining the degree of care and skill which the law exacts of physicians and surgeons, regard must be had to the state of advancement of the profession at the time of the treatment. Such treatment is to be measured by the standards existing at the time in question and not those which may have existed at some time in the past.[21] It is not negligence for a physician or surgeon to use methods recognized as proper by the profession generally, although it is a

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17 Forthofer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

18 Spead v. Tomilson, 73 N.H. 46, 59 Atl. 776 (1904).

19 Whipple v. Grandchamp, 261 Mass. 40, 158 N.E. 270 (1927); Hilgedorf v. Bertschinger, 132 Ore. 641, 285 Pac. 819 (1930).

20 Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228 (1888).

21 Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 856 (1902).

duty of a physician or surgeon to keep up with the advancement made by his profession. It is also his duty to refrain from trying experiments on his patients. It is incumbent on him to conform to the mode established by his school of practice for the treatment of given conditions. If he departs therefrom, he does so at his own peril.

A physician may adopt new methods as they are approved by the profession.[22] This qualification gives to the profession the opportunity to make progress after the experimental stages in the development of a new method. However, it does not authorize the trying of untested experiments on patients. If an experiment is tried on a patient, it is at the financial risk of the physician rather than of the patient. More recently it has been held that the duty of a physician to bring to his patient better, more advanced, or more favorable modes of treatment, facilities, training, or special skill than he himself, or the community in which he practices can afford, is measured by existing conditions of rapid transportation and an easy means of communication rather than by those of the past.[23]

*Locality or Place of Practice*

The character of the locality or neighborhood in which the medical art is practiced has an important bearing upon the requisite degree of skill and care that is required of the physician. In view of the difference in opportunities, expense, and conditions of practice between densely and sparsely populated communities, a physician's liability should be measured by a like standard to that of the community in which he practices.

In determining what constitutes reasonable and ordinary care, skill, and diligence, the test is that which physicians and surgeons in the same general neighborhood have and exercise at the time in like cases. In some of the decisions a physician or surgeon is held only to that degree of diligence, learning, and skill possessed by physicians and surgeons of the particular locality where he practices. However, because the standard may be exceptionally high or exceptionally low in a particular community, it is the sounder rule that the requisite standard of skill and care should be determined not by that of the particular locality, but by the standards of the physicians of ordinary skill, and care, in similar communities.[24]

Some courts have refused to set any standard based on locality of practice and have instead said that among the circumstances to

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[22] Miller v. Toles, 183 Mich. 252, 150 N.W. 118 (1914).

[23] Tvedt v. Haugen, *supra* note 2.

[24] Mutchman v. Petry, 46 Ohio App. 525, 189 N.E. 658 (1933).

be considered is the location of the physician in the place of his practice, rather than in some other place.[25] There is authority that a general practitioner in a small town is not held to the same high degree of art and skill in surgery attained by those in larger cities making a specialty of surgery.[26]

### Application of Standards to Treatment

Previously, consideration has been given to the professional obligation of a physician to his patient. Emphasis has been given to his general duty of care to the patient, the general standards of skill and care, and to the effect thereon of particular circumstances. The following law concerns the application of the rules and standards there discussed, to the various phases of treatment of a patient by his physician or surgeon as indicated under the following heading:

#### *Diagnosis*

It is one of the fundamental duties of a physician to make a properly skillful and careful diagnosis of the ailment of a patient. If he fails to bring to that diagnosis the proper degree of skill or care, and makes an incorrect diagnosis, he may be held liable to the patient for the damages thus caused. He is as liable as he would be for the application of improper treatment.[27] While a physician or surgeon does not insure the correctness of his diagnosis, his responsibility in diagnosing a patient's malady is to use ordinary skill and diligence in applying the means and methods ordinarily and generally used by physicians of ordinary skill and learning in the practice of the profession, to determine the nature of the ailment and to act upon his honest opinions and conclusions.

As a means of illustrating these general rules, it may be negligence for a physician to treat an injury as a bruise where there are positive symptoms of which he is aware indicating that the injury is a fracture or dislocation. In some jurisdictions, however, the general rule is subjected to the qualification that an incorrect diagnosis is not actionable unless followed by improper treatment.[28] It has been held that a physician is not liable to a patient for a mistaken diagnosis if the treatment administered was proper for the patient's actual malady, or if the treatment administered caused no injury to the patient and the injury or discomfort suffered resulted solely from the patient's malady.[29]

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25 Viita v. Fleming, *supra* note 7.

26 Small v. Howard, 128 Mass. 131, 35 Am. Rep. 368 (1879).

27 Paulson v. Stocker, 53 Ohio App. 229, 4 N.E.2d 609 (1935).

28 Just v. Littlefield, 87 Wash. 299, 151 Pac. 280 (1915).

29 Hill v. Boughton, 146 Fla. 505, 1 So. 2d 610 (1941).

Ordinarily the physician or surgeon is not liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical conditions involved, or as to what should be done in accordance with recognized authority and good current practice. The same is true where a diagnosis is made in good faith, on observation of the patient and based upon physical evidence of symptoms which would warrant such diagnosis by a reasonably prudent and informed physician, even though the physician in question did not prescribe for the patient and was not his attending physician.[30]

*Use of X-ray or Other Aids or Tests*

It has been held that a physician or surgeon is negligent in failing first to ascertain that his patient is in a condition to undergo safely a proposed treatment or operation before proceeding, where such treatment or operation may involve risk or danger to the patient. However, to prove negligence, it must be shown that the recognized professional standards of skill and care and the existing state of medical knowledge require the making of tests or examinations which are generally accepted by the profession before undertaking the proposed treatment or examination. The circumstances of a given case may, of course, render the general rules inoperative. Such would be the case where no competent physician has made the requested examination or tests of the patient before sending the patient to the physician in question for treatment of a specified nature.[31] To restate the foregoing, it has been held that failure to use X-rays in a case of doubt may render a practitioner liable for damages for injuries resulting therefrom where the tenets of such practitioner's school call for the use of such X-rays as an aid in the diagnosis in cases of doubt, and where the conditions are similar to those in the case in suit. Failure of a physician consulted as to a possible foreign substance in an eye to use an opthalmoscope to make an X-ray picture of the eye, is prima facie evidence of negligence. A surgeon is not negligent as a matter of law in amputating an arm without first making an X-ray examination where the mangled and shattered condition of the elbow was apparant to sight and feeling so that an X-ray examination would have aided nothing, and three physicians had agreed on consultation that the amputation was necessary.[32] In all such cases, it is essential that the negli-

30 McGuire v. Anyx, 317 Mo. 1061, 297 S.W. 968 (1927).
31 Sweeney v. Erving, 35 App. D.C. 57, 43 L.R.A. (n.s.) 734 (1910).
32 Jachovach v. Yocom, 212 Iowa 914, 237 N.W. 444 (1931).

gence of the physician shall have been the proximate cause of the patient's injury to render him liable in damages.[33]

*Preliminary and Preparatory Treatment*

It is incumbent upon a physician or surgeon, in the exercise of due and reasonable care and skill, to inform himself by the proper test and examination of the condition of his patient to undergo a proposed treatment or operation. He must do this intelligently, and exercise the skill of his calling. The question of whether or not his failure to make such test or examination in a particular case constitutes want of due and reasonable care and skill, depends upon whether the standards of skill and care earlier stated required such test or examination in the particular case.

The failure of a specialist to make any test before administering treatment has been held to have been justified where the patient had been under the treatment of a competent surgeon who recommended the treatment in question. Negligence of a surgeon cannot be predicated on his failure to make a certain preliminary test to ascertain the hazard of a dangerous operation about to be performed on a patient, where it does not appear that want of such test contributed to the patient's death during the operation, or that such tests were ever made in similar operations in that vicinity.[34]

Where proper examinations are made by the surgeon preparatory to operating he has been held not answerable as for negligence in failing to discover a condition which made extra hazardous the giving of the anesthetic used.[35]

*The Use and Administration of Anesthetics*

The duties and liabilities of a physician or surgeon in administering an anesthetic to a patient are substantially the same as those which govern him in treating a patient generally. He is bound to exercise such reasonable care and skill as is usually exercised by average physicians or surgeons of good standing in the community in which he practices. The surgeon is charged with the duty of acting on his best bona fide judgment, and is not liable for injuries or death resulting without negligence from honest errors of judgment. It has been said however that the surgeon is liable if his mistake of judgment is so gross as to constitute negligence.

*Surgical Operations*

A surgeon who undertakes to perform a surgical operation is un-

[33] Lippold v. Kidd, 126 Ore. 160, 269 Pac. 210 (1928).

[34] Harvey v. Richardson, 91 Wash. 245, 157 Pac. 674 (1917).

[35] Loudon v. Scott, *supra* note 14.

der the duty to exercise such reasonable care, skill, and diligence as is usually exercised by surgeons in similar cases. The rule exacts a higher degree of skill and care of a surgeon who specializes in surgical operations than is required of the average general practitioner of medicine. The operation begins when the incision is made and ends when it is closed. The duty to exercise such care, skill and diligence exists throughout the whole operation.[36]

*Leaving Foreign Substances in a Wound*

Many cases of malpractice arising out of surgical operations result from the leaving of surgical sponges, gauze, or other foreign substances in the wound after it is closed. This, it is said, is at least prima facie negligence by the operating surgeon.[37] There are many cases which take the view that the failure of a surgeon to remove all sponges or foreign substances from a surgical wound is negligence per se.[38]

*Postoperative Treatment*

An operating surgeon must, after performing an operation, exercise the same care and skill in subsequent necessary treatment until the patient's recovery, as in performing the operation. This is true unless the terms of employment otherwise limit these services or the patient gives notice that he cannot or will not afford the subsequent treatment.[39]

*Instructions as to Care and Treatment After Cessation of Attendance*

It is a physician's duty, although his actual personal service is completed, to give to the patient proper instructions regarding the future treatment of a yet not completely cured ailment. It is his further duty to warn and instruct persons having the care of the patient, if they are ignorant or inexperienced, as to the performance of the duty which they have undertaken.

*Diligence in Visiting or Treating Patient*

It is a physician's right, in the first instance, to determine the frequency of his professional visits to the patient. If the latter accepts the physician's services and does not discharge him or limit

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[36] Palmer v. Humiston, *supra* note 9.; Gillette v. Tucker, *supra* note 21.

[37] Palmer v. Humiston, *supra* note 9.

[38] Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518 (1926).

[39] Ales v. Ryan, 54 P.2d 782, (Cal. Ct. App. 1936); Smith v. Zeagler, 116 Fla. 628, 157 So. 328 (1934); McCormick v. Jones, 152 Wash. 508, 278 Pac. 181 (1929).

the times and number of his visits, the patient cannot thereafter object to the number of visits made. Unless the relation of physician and patient has been legally terminated, it is the duty of the attending physician to use reasonable care and skill in determining the frequency of his visits and use diligence in making those visits.

*Professional Judgment and Cure Not Guaranteed*

The doctrine is well settled that the general practitioner of medicine or of surgery does not, in the absence of special contract, impliedly warrant the success of his treatment or operation. He warrants only that he possesses and will carefully apply, such professional skill and learning as are ordinarily possessed by general medical practitioners in the locality in which he practices.[40]

The law does not raise from the fact of employment an implied undertaking to cure, only an undertaking to use ordinary skill and care. Even the fact that the unfortunate result might have been avoided does not render a physician liable if he used during his attendance proper skill and care and his best judgment.

CONCLUSION

There is no question that, in Ohio, the doctor performing an operation is held and has always been held to the ordinary degree of skill, care and diligence exercised by members of the same profession.[41] Moreover, the law of Ohio has become stabilized regarding the liability of hospitals for the negligence of their employees, as well as the liability of doctors generally for the negligence of their assistants.[42] At the same time the author is of the (perhaps hopeful) opinion that more cases are being settled and that fewer cases are being brought for their nuisance value than ever before.

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40 Gillette v. Tucker, *supra* note 21; Bowers v. Santee, *supra* note 38.

41 Gillette v. Tucker, *supra* note 21; Bowers v. Santee, *supra* note 38, at 361.

42 Klema v. St. Elizabeth's Hosp. of Youngstown, 170 Ohio St. 519, 166 N.E.2d 765 (1960); Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Rudy v. Lakeside Hosp., 115 Ohio St. 539; 155 N.E. 126 (1926); Taylor v. The Protestant Hosp. Ass'n., 85 Ohio St. 90, 96 N.E. 1089 (1911); Koubeck v. Fairview Hosp.; Civil No. 690, 589 C. P. Cuyahoga Co. (1960); No. 25,391, 8th Dist. Ct. App. (Ohio, 1960). A case of more than usual interest which is representative of the Ohio law is Morgan v. Sheppard, No. 26,076, 8th Dist. Ct. App. (Ohio, 1963).